STATE OF WISCONSIN

Department of Commerce

In the Matter of the PECFA Appeal of

Jerry Dybul
Dybul Kerr-McGee
P. O. Box 313
Mukwonago, WI 53149-0313

PECFA Claim #53110-1040-70
Hearing #96-39

Final Decision

P R E L I M I N A R Y R E C I T A L S

Pursuant to a petition for hearing filed October 4, 1995, under § 101.02(6)(e), Wis. Stats., and §ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, now Department of Commerce, a hearing was commenced on September 10, 1996, at Madison, Wisconsin. A proposed decision was issued on June 6, 1997, and the parties were provided a period of twenty (20) days to file objections.

The issue for determination is:

> Whether the department's decision to deny reimbursement from the PECFA fund of costs in the amount of $20,650.69, incurred by the appellant in the remediation of his site, was correct.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Jerry Dybul
Dybul Kerr-McGee
P. O. Box 313
Mukwonago, WI 53149-0313

By: In Person

Department of Commerce
PECFA Bureau
201 W. Washington Avenue
P.O. Box 7838
Madison WI 53707-7838

By: Michael J. Mathis

C/o Kelly Cochrane, Assistant Legal Counsel
Department of Commerce
201 W. Washington Avenue
P. O. Box 7970
Madison, WI 53707-7970

The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Secretary dated February 6, 1997.

The matter now being ready for decision, I hereby issue the following

F I N D I N G S O F F A C T

The Findings of Fact in the Proposed Decision dated June 6, 1997 are hereby adopted for purposes of this final decision.

C O N C L U S I O N S O F L A W

The Conclusions of Law in the Proposed Decision dated June 6, 1997 are hereby adopted for purposes of this final decision.

F I N A L D E C I S I O N

The Proposed Decision dated June 6, 1997, is hereby adopted as the final decision of the department.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the mailing date of this decision as indicated below. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" and counsel named in this decision. The process for judicial review is described in Sec. 227.51 of the statutes.

Dated: June 11, 1998

Christopher C. Mohnnan
Executive Assistant
Department of Commerce
PO Box 7970
Madison WI 53707-7970

cc: Jerry Dybul
Kelly Cochrane, Assistant Legal Counsel, Department of Commerce
Dispute Resolution Coordinator, PECFA

Date Mailed: June 24, 1998

Mailed By: Diane Castillon

STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

IN THE MATTER OF: The claim for reimbursement under the PECFA Program by

MADISON HEARING OFFICE
1801 Aberg Ave., Suite A
P.O. Box 7975
Madison, WI 53707-7975
Telephone: (608) 242-4818
Fax: (608) 242-4813

Jerry Dybul
Dybul Kerr-McGee
P.O. Box 313
Mukwonago, WI 53149-0313

Appellant,

vs.

PECFA CLAIM #53110-1040-70

Secretary, Wisconsin Department of Commerce

Hearing Number: 96-39

Respondent

PROPOSED DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Christopher C. Mohrman, Executive Assistant to the Secretary of the Department of Commerce, who is the individual designated to make the FINAL Decision of the Department of Commerce in this matter.

STATE HEARING EXAMINER:
Ronald I. Weisbrod

DATED AND MAILED:
June 6, 1997

* *

MAILED TO:

Appellant Agent or Attorney
Jerry Dybul
Dybul Kerr-McGee
P.O. Box 313
Mukwonago, Wi 53149-0313

Department of Commerce
Michael J. Mathis, Attorney
UI Bureau of Legal Affairs
P.O. Box 8942
Madison, WI 53707-8942

PRELIMINARY RECITALS

Pursuant to a petition filed on October 4, 1995, under Section 101.02(6)(e), Wis. Stats., and Section ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Commerce, a hearing was held on September 10, 1996, at Madison, Wisconsin, before Ronald I. Weisbrod, Administrative Law Judge, acting as a Hearing Examiner.

The issues for determination are :

A. Whether the department's decision to deny reimbursement from the PECFA fund of costs in the amount of $20,650.69, incurred by the appellant in the remediation of his site, was correct.

PARTIES IN INTEREST:

Jerry Dybul
Dybul Kerr-McGee
P.O. Box 313
Mukwonago, WI 53149-0313

Department of Commerce
by: Attorney Michael J. Mathis
UI Bureau of Legal Affairs
P.O. Box 8942
Madison, WI 53707-8942

FINDINGS OF FACT

1. The appellant owns the property located at 4570 S. Kinnickinnic Ave. , Cudahy, WI 53110, which is the subject of PECFA claim #53110-1040-70 .

2. In January 1992, several of the appellant's USTs failed a test designed to detect the leaking of petroleum products. At that time, those tanks were taken out of service.

3. By letter dated January 28, 1992, the appellant notified the Department of Industry, Labor and Human Relations that three of its tanks had failed a tightness test.

4. Subsequent soil tests showed contamination. The appellant then contracted with Applied Environmental Sciences (AES) to perform site investigation and environmental consulting services and contracted with Midwest Petroleum Services, Inc., (MWP) to perform site cleanup.

5. All of the appellant's nine underground storage tanks were removed on September 29 and 30, 1992. The department was notified that the site cleanup was completed on

6. In 1995, the appellant submitted a claim for reimbursement of its cleanup costs under the Petroleum Environmental Cleanup Fund Act (PECFA).

7. The policy of the PECFA fund is that cleanups are to be done in the most cost efficient manner possible.

8. On September 6, 1995, the Department denied reimbursement of a portion of the appellant's PECFA claim in the amount of $20,650.69.

9. Of the total amount denied, $2726.25 was disallowed because it was for costs incurred prior to the Department of Natural Resources (DNR) being notified of a confirmed discharge. The DNR reported that it was first notified on March 31, 1992.

10. The Department disallowed $300 for ionization detector charges because as of February 11, 1992, it had decided that more than $75 a day would not be a reasonable expense.

11. The Department disallowed $50 for overtime paid for drilling because such charges were not reimbursable under the program;

12. The department disallowed $200 of the mobilization charge for the second of the three days spent on this project by the driller, but did award $100 to compensate for what would have been reasonable costs for the contractor staying overnight.

13. The department disallowed $7884.09 billed the appellant by the environmental consulting firm (AES) in the form of a 15% markup fee on various invoices because it and the contractor (MWP) were not totally independent of each other when the work was performed. The sole owner of AES was married to a shareholder and vice-president of MWP.

14. The department disallowed $440 that MWP and AES had charged the appellant for meeting together to discuss the project because it constituted a duplication of effort.

15. The department disallowed $190.51 because the services provided were duplicated due to the relationship between the two contractors, or were for in-house charges for printing, postage or telephone calls, or were for markups on mileage charges. The program did not allow markup costs when there was not a total independence between the consulting firm and the contractor performing the cleanup work. The PECFA procedures did not allow reimbursements for office overhead expenses, such as meals, lodging, transportation, telephones.

16. The department disallowed $8859.84 because the amounts appeared to be associated with work performed to remove the tanks. Tank removal costs were not reimbursable under the PECFA program.

17. The appellant agreed that the department was correct in disallowing $3977.31 from the MWP invoice of 5/31/92.

18. The appellant agreed that the Department was correct in denying reimbursement in the amount of $440 charged by AES and MWP for meeting to discuss the project.

DISCUSSION

The Petroleum Environmental Cleanup Fund Act provides for reimbursement of eligible cleanup costs incurred by a site owner. The amounts in dispute were paid by the appellant. It was the appellant's primary contention that he should be reimbursed for the costs he incurred because the PECFA program was created for that purpose. However, it is the site owner's burden to establish, through proper documentation, that the services provided by the contractors hired to remediate the site met the criteria for reimbursement.

The appellant contended that a copy of a letter, dated January 28, 1992, established that his representative had notified the DNR by telephone of a potential spill from the tanks on January 27, 1992. However, the author of that letter did not testify at the hearing. Therefore, no competent evidence was provided that would corroborate the accuracy of the statements made in that letter. The finding desired by the appellant cannot be based on the hearsay evidence he presented.

The appellant was aware the costs of tank removal were not reimbursable by PECFA. The appellant contended that the work performed as billed on the October and November 1992 contractor's invoices, did not include any amounts for tank removal because the contractors were aware that PECFA would not reimburse those costs. However, it does not follow that because the tanks were removed in September 1992, that the contractors would not bill the appellant for that work on a later invoice. The wording in the invoice suggested to the department that the work was performed in removing the tanks. For verification that the work was eligible for reimbursement, the department requested additional information from the contractors. Neither the contractors nor the appellant provided that information. As a result, the department denied the invoiced amount. The appellant did not prepare those invoices and could provide only hearsay evidence regarding the work billed in those invoices. Accordingly, he failed to establish that any of the invoiced amounts were reimbursable.

The appellant contended that he should not be held responsible for verifying that the contractors hired to perform the cleanup work were independent companies. However, in essence, that is what is required under reimbursement legislation. The department had obtained information from which it was reasonable to conclude that the two contractors were not totally independent of each other. It was the appellant's burden to establish that they were independent. At the hearing the appellant did not show that the individuals associated with the two contractors, whose relationship was in question, were not married at the time their companies provided the remediation services to the appellant.

The appellant suggested that the driller had transported expensive equipment to the cleanup site; that it would not have been prudent to leave that equipment overnight at the site so the department should have paid the full costs of taking the equipment to and from the site each day totaling an additional $200. However, it was not established that the driller actually took the equipment off the site each night or if so, what the driller's rationale was for doing so. Moreover, prudent or not, the PECFA program does not reimburse for such costs but rather, limits payments to the least expensive option. In this case, it would have cost less for the driller to have remained in the area overnight.

The appellant offered a copy of a department underground tank closure checklist form that was purportedly completed by a employee of the contractor on September 29, 1992, listing all nine of the appellant's USTs as being removed at that time. Although the appellant did not provide any witness who had worked for one of the contractors that was present at the site on September 29, 1992, to verify that all nine tanks were removed on that date, the appellant himself was able to provide credible, first-hand testimony to establish that the tanks were removed at that time.

The appellant contended that because the tanks were removed before October 1, 1992, the AES invoice for October 1992, in the amount of $4831.34, should have been reimbursed in its entirety because none of the charges listed on that invoice could have been for tank removal. That contention cannot be sustained. Because of the terminology used on that invoice to describe the work performed, it was appropriate for the department to question whether the work performed on that invoice was eligible and, in the absence of a detailed response, to deny reimbursement of the entire invoice. Moreover, the appellant failed to establish at the hearing that the work described on that invoice did not include tank closure work performed before the invoice period beginning October 1, 1992.

ILHR Chapter 10 of the Wisconsin Administrative Code provides a definition of tank systems. USTs, pipes, pumps, islands, and canopies are all part of a tank system. The PECFA overview speaks of a tank system, not just a tank. Accordingly, $2503.50 was considered a non-eligible cost because the lines pump islands, canopies, are all treated as part of the tank system.

CONCLUSIONS OF LAW

1. The appellant is not entitled to reimbursement of $2726.25 because the costs were incurred prior to Department of Natural Resources notification of the petroleum discharge, within the meaning of section 101.143(3)(a)5 of the 1991 Wisconsin Statutes and PECFA overview #3, effective December 19, 1991.

2. The appellant is not entitled to reimbursement of $300 for ionization detector charges because those costs were excessive, within the meaning of PECFA overview #3, effective December 19, 1991.

3. The appellant is not entitled to reimbursement of $50 because the payment was for non-emergency overtime drilling costs, within the meaning of PECFA overview #3, effective December 19, 1991.

4. The appellant is not entitled to reimbursement of $200 for the contractor's charges to remove and setup the drilling equipment at the site because those costs were excessive, within the meaning of PECFA overview #3, effective December 19, 1991.

5. The appellant is not entitled to reimbursement of $7884.09 for a 15% markup by the consultant (AES) because it was not established that the consultant and the remediation contractor were separate entities, as required by PECFA overview #3, effective December 19, 1991.

6. The appellant is not entitled to reimbursement of $440 because charging for a meeting between the contractors was an unnecessary expense, within the meaning of PECFA overview #3, effective December 19, 1991.

7. The appellant is not entitled to reimbursement of $190.51 because the kinds of services provided were not reimbursable, within the meaning of PECFA overview #3, effective December 19, 1991.

8. The appellant is not entitled to reimbursement of $8859.84 because charges were for work performed in removal of the underground storage tanks, within the meaning of section 101-143(4)(c)7 of the 1991 Wisconsin Statutes, ILHR Chapter 10 of the Wisconsin Administrative Code, and PECFA overview #3, effective December 19, 1991.

PROPOSED DECISION

That the department's decision to deny the appellant's request for reimbursement of $20,650.69 for cleanup costs incurred at the 4570 S. Kinnickinnic Ave., Cudahy, Wisconsin, site, be affirmed.

HEARING EXAMINER

by Ronald I. Weisbrod
Administrative Law Judge

96-39/riw